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ABSTRACT

A rationale for developing courses and programs at the undergraduate level, in law school, and in continuing legal education that will serve to raise the communication level of the legal profession is proposed. The rationale is presented around five themes: (1) the relationship between communication and law from antiquity to the establishment of the modern law school; (2) the nature and criticism of the case approach to teaching law; (3) a description of lawyering skills and a justification to include practical skills as one dimension of law school education; (4) the nature of skills training in law school today; and (5) how communication education can assist legal education in the further development of teaching lawyering skills. Among the recommendations proposed are the need for joint research between interpersonal communication theory, public communication theory, and argumentation theory to the practice of law; the need for the communications faculty to learn more about law; the need to adapt undergraduate instruction in speech communication to the interest of prelaw students; and the need for law schools to learn what constitutes a speech communication major. (HOD)

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Bridging the Gap Between Communication Education and Legal Education

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The purpose of this paper is to present a rationale for developing courses and programs at the undergraduate level, in law school, and in continuing legal education that will serve to raise the communication level of the legal profession. In order to best develop this theme, five related ideas will be discussed: (1) the relationship between communication and law from antiquity to the establishment of the modern law school; (2) the nature and criticism of the case approach to teaching law; (3) a description of lawyering skills and a justification to include practical skills as one dimension of law school education; (4) the nature of skills training in law school today; and (5) how communication education can assist legal education in the further development of teaching lawyering skills.

Communication and Law from Antiquity to the Modern Law School

The predecessor to the term "communication" was "rhetoric," a body of theory concerned with the art of discourse. In antiquity, "the study of rhetoric and preparation for the practice of law were the same."[1] "The classical rhetors, holding that rhetoric was an art which could effectively energize truth, discussed extensively its applications of forensic [legal] speaking."[2] In fact, the law schools of ancient Greece and Rome were known as schools of oratory. Why was this the case? Anapol explains:

> In looking back to the Greco-Roman era it seems clear that the needs of those societies for a dispute settlement system gave rise to the development of both rhetoric and law... In the Greek culture law was not highly developed and the rhetorician provided most of the training for the advocate and much of the writing concerning jurisprudence. The Romans were more concerned with legal matters since they had an extensive empire to govern, but perhaps because of the Greek influence rhetoric was a major component of the Roman legal system.[3]

Thus, rhetoric and law were closely interrelated.

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For centuries, judicial theory took as its content some of the subject matter found in Aristotle's Rhetoric. Roughly half of Book One is devoted to the topic of forensic speeches. Book Two constitutes an examination of logical proof, or the establishing of facts in court. Language and style in the trial setting are treated in Book Three.

Cicero and Quintilian, the two leading Roman rhetoricians, were also major contributors to the field of law. In his work on rhetoric, Cicero interwove a threefold method for finding issues in a legal matter. They were the reason for committing the crime (causa), the personal circumstances of the alleged criminal (persona), and the particulars of the crime itself (factum). Meanwhile, Quintilian developed a series of speaking exercises called controversiae which appear to be "forerunners of the hypothetical cases still used in law schools."[4]

Rhetoric (communication) and law grew together through antiquity. They also declined together during the Middle Ages largely because of the conditions of the time. There was no need for law, and, as for rhetoric, it was limited to the discourse of homiletics, not of law. The legal examples which flavored classical rhetorics virtually disappeared from the medieval rhetorics largely because the Church frowned on anything which was developed in pagan times.

The disappearance of forensic oratory from the development of rhetorical theory became more emphasized in the sixteenth century. Concerned with overlap in educational disciplines, Peter Ramus believed that Aristotle's treatment of the discovery and development of ideas, including logic and organization, was to be located in the discipline of logic. To rhetoric, Ramus assigned delivery and style (figures of speech). Naturally, this drove a wedge between rhetoric and a newly developing legal theory advanced by people such as Blackstone. Hence, "English common law, which also became the foundation of American law, developed without any great concern for the ... rhetorical

traditions of the past."[5]

Three separate phenomena in communication and law occurred in the eighteenth century. First, rhetorical theory was flourishing in England through the writings of clergymen Hugh Blair, George Campbell, and Richard Whately. Their rhetorics were used extensively in American colleges and did have references to law in them. Second, legal theory continued to develop, but apart from rhetorical theory. Legal philosophers such as Kant, Hobbes, and Bentham showed virtually no systematized knowledge of classical rhetoric in their writings. Third, students in training for the law received a predominantly practical education, thereby avoiding most of the theory developed by the rhetorical and legal scholars noted above. Since there will be a strong defense of practical education developed later in this paper, it is necessary to devote some emphasis to this period in the history of legal education.

Gee and Jackson describe eighteenth century legal education in America as follows:

> Prior to and some time after the American Revolution, it was possible to obtain a legal education in any one of a number of ways: the lawyer-aspirant could by his own reading of legal materials hope to gain the requisite knowledge and skills; he could serve as an assistant in the clerk's office of some court; he could attend one of the nation's fledgling colleges that provided by means of a general education a firmer foundation for the independent study of law; or he could attend one of the Inns of Court in England. Without question, however, the principal means of obtaining a legal education in America was through the apprenticeship system.[6]

Fledgling lawyers were apprenticed by practicing lawyers for periods up to three years. Imitation was the pedagogical method. Observing their mentors in action, the lawyers to-be learned how to practice law and, supposedly, something about the body of law as well.

Of course, for the day-to-day contact to be meaningful to the student, the practitioners had to give considerable individual attention to their apprentices. Alas, such was not always the case. Some attorneys were quite

conscientious, while others were lax and inattentive. Many of the apprentices were directly out of secondary school and, unless they read books on their own, knew very little about the society in which they lived. The apprenticeship system was inefficient and cursory and "no system...that so clearly failed to provide systematic legal training could long survive."[7]

However, this one did survive, probably long after it should have. There are at least two explanations for this. First, undergraduate colleges had courses in jurisprudence as part of a general liberal arts education. However, the instructors did not emphasize the practical aspects of law. The curricula were largely theoretical and philosophical with a closed eye toward the practitioner.[8] Even with the establishment of law professorships,[9] there remained a post-graduate demand for apprenticeship education. The growth and development of law schools came about very slowly largely because lawyers "clung tenaciously to the notion that legal education was nothing more than the mastering of a craft, the skills for which had to be passed on from the practitioner to the novice."[10] Through their bar associations, lawyers supported the apprenticeship system over law school education. They did this by setting standards of admission to the practice conditional only on a period of training under a preceptor in a law office.[11] Because they had control over admission to the bar, practicing attorneys easily prevailed in this challenge from academicians.

Second, non-university related law schools developed as a middle-ground alternative to both the apprenticeship system and a university legal education. "The private or independent law school was a natural outgrowth of the apprenticeship method of legal education. Early proprietary schools have been characterized as essentially...specialized and elaborated law offices."[12]

The private law school did not reflect scholarship, nor was it capricious in its teaching lawyering skills. It therefore responded to what the practicing bar wanted while, at the same time, overcame the disadvantages of the

apprenticeship system. The first private American law school was the Litchfield School in Connecticut. It existed for nearly fifty years (1784-1833). Work was completed at Litchfield in approximately one year and the teaching program stressed practical needs and considerations.[13] One author called this kind of training "a group apprenticeship system."[14]

With the nineteenth century came an important transition in legal education. The century began with an emphasis on the practical; it ended with an emphasis on the theoretical. In the first half of the century there was a great surge of feeling in America that "exalted the rights and powers of the common man. This wave reached its crest with the election of Andrew Jackson ...in 1828."[15] Jackson and his followers had little respect for formal legal education. The focal point of their attack, however, was not on the universities, but on the bar associations. In the 1830's, state legislatures rid the legal profession of its regulation over admission to the bar and essentially allowed anyone "of good moral character" to enter practice. These egalitarian and clearly relaxed standards for admission to practice eliminated the need for apprenticeship or private law school training. By the middle of the nineteenth century, both the private law school and many apprenticeships had been substantially minimized in importance.

In the latter half of the century, what we now know as the modern university-related law school began to fill the void. There was a period of time, of course, where America had a two-tiered system of legal education - the private law school for part-time students interested in practical skills and the university-based law school where students were asked to perform "intellectually challenging legal tasks."[16] "By 1870, the date conceded by many to be the beginning of the modern law school,"[17] the future lawyer was commonly devoting full time "to his books and lectures and the distraction of office and court work were removed. There followed the period when the leading law schools were dominated by the great

systematic text-book writers, the makers of so-called 'substantive law', which was divorced and living apart from procedure. The rift widened between theory and practice."[18] Gee and Jackson elaborate:

> The apprenticeship system did not disappear overnight, but it did rapidly lose favor, and by the early 1900s was not a viable option for the study of law in most jurisdictions. ... Obviously, this trend toward formal training was tied to the growth of the university as the center of learning. And, as with the rest of university curriculum endeavors, law school soon eliminated all aspects of practical training from their programs.[19]

Although communication (rhetorical) education with its emphasis on practical public discourse was developing in other parts of academia, it did not work its way into the curriculum of the law school. What was going on in the law school was, in large part, modeled after what had been done in the Harvard curriculum, namely, the introduction of the case method.[20]

The Nature and Criticism of the Case Approach to Teaching Law

Students attending law school in the mid-nineteenth century "sat passively to listen to detailed lectures, with the principal points memorized by rote."[21] But, by the end of the century, "the vast bulk of law schools...used the case class"[22] method which allowed the student to participate more actively in his education. What was the case class and how did it develop?

Founder of this method was Christopher Columbus Langdell who was appointed to the Harvard Law School in 1870. In many ways, the method was the expression of Langdell's belief that law school meant library law. As a law student himself, Langdell was always in the library. His fellow students even reported that he slept on the library table. After law school, he joined a New York law firm, but instead of practicing, he spent most of his time in research at the New York Law Institute. This rather secluded life with a keen interest in books led Langdell to the position where he believed that the way to learn law was to go to the library, read pages and pages of law reports and judges'

opinions, and then gradually discover what is meant by substantive law. "The lawyer-client relation, the numerous non-rational factors involved in persuasion of a judge at trial, the face-to-face appeals to the emotions of juries, the elements that go to make up what is loosely known as the 'atmosphere' of a case...was virtually unknown (and therefore meaningless) to Langdell."[23]

The case method is based on the notion that law is a science and, as such, it consists of certain principles or doctrines. The only way to understand these doctrines, relatively few in number, is to study the cases in which they are embodied. Once a student mastered these doctrines, he would then apply them to the solution of future legal problems.

To aid the students, Langdell (and others) prepared casebooks. Cases were grouped together around particular areas of law (e.g., Contracts, Torts) for the purpose of providing the content of the student's educational experience. The judges' opinions were largely from appellate courts and were generally leading or influential cases. "The criterion of selection was: Had the case substantially contributed to the development of the essential doctrines of the law? The cases that passed the test were then arranged in chronological sequence under conceptual headings."[24]

The purpose of studying cases and distilling from them key legal principles was to develop "the mental process involved in the analysis, synthesis, and distinction of appellate opinions."[25] This, in turn, was to have developed reasoning skills on the part of the student. Therefore, the Langdell method was based on a dynamic, rather than static, view of the legal process on the grounds that "by requiring the student to state, analyze, evaluate, and compare concrete fact situations, to use sources as they are used by lawyers and judges, and then to formulate his own basic propositions, it serves to train him in the skills and techniques of the profession and develop his powers of analysis, reason, and expression, goals which are placed above the

encyclopedic knowledge of legal rules."[26] To some, the case method was seen as a kind of skills or practical approach to legal education. The "skill" was the writing of briefs well documented by judicial authorities. To others, the case method was seen as a way of learning the theory of substantive law.

There are many ways to teach the case method. Morgan has identified three of them. First, the instructor used the reported case merely as a vehicle for imparting information concerning legal doctrine to give the student a passing acquaintance with certain selected principles. Second, the instructor went a step further and insisted on a careful statement of the facts, requiring the student to discard details of no legal significance and to include all those having a material bearing upon the legal relations of the parties. This helped the student get a more thorough understanding of each case. Third, the instructor varied the manner of handling the cases. He began with a statement of the case by a student or by putting a hypothetical set of facts varying only in immaterial details from the case in the text. As the discussion proceeded, the instructor submitted divergent fact situations. This encouraged the student to think, to discriminate, to make an evaluation of the fairness of a decision, and to arrive at a conclusion about the case. Later, the instructor may have given the results reached by the courts pertaining to the issue under discussion and whether or not the doctrines involved had been modified by statute.[27]

To replace the tedious lecture method, the case approach utilized a Socratic teaching method, "with probing questions from the instructor, and answers from students, sometimes criticized or amplified by other members of the class."[28] Fundamentally inductive, the law student had dumped in his lap a mass of undistilled raw data from which he had to build a conceptual structure. "The Socratic method assumes the student is the architect who will build the conceptual structure from the cases and other material. In the student's mind the data become concept."[29]

The professor asked questions such as how the case got before the court, what do the parties really want, what does the judge think is the issue, is the opinion intelligible, was the opinion correct, and so forth.

The case method became the modus operandi for at least one and possibly all three years of full-time legal education.[30] From the end of the nineteenth century and well into the twentieth century, it was generally accepted in law schools throughout the country. The cases and doctrines became part of typical law school examinations and subsequent bar examinations. And, "since the process involved in the case method is purely an intellectual one, the full-time scholarly law teacher emerged as the almost exclusive purveyor of legal education."[31] Bellow and Johnson describe the case class atmosphere as follows:

> A...purpose in legal education...is to develop a set of intellectual skills with which to function as a lawyer. The phrase 'teaching students to think like lawyers' reflects a long standing law teaching emphasis on cognitive processes rather than on performance skills. It is, of course, unclear how the thinking of lawyers is qualitatively different from other forms of disciplined, analytical reasoning. Nevertheless, there has been...continued emphasis in legal training on sharpening the ability of law students to carefully delineate relevant variables, and to apply them to complex factual constellations and social policies. This concern has been expressed in an appropriate doctrinal vocabulary, gleaned primarily from judicial decisions, and taught in a question and answer format which seeks to expose the student to the authoritative principles of law.[32]

The case method did have its critics. The attacks began shortly after the First World War and their impetus came "from the development of the 'Realist' school of jurisprudence which looked upon judicial opinions in a manner radically different from Dean Langdell's self-contained analysis."[33] Although some of the following arguments received greater attention than others, there were essentially six objections raised by the opposition to the case approach.

First, the case method was inefficient. It took a lot of time "without commensurate education returns to the students."[34]

Second, the method actually did little to synthesize the law with related disciplines. It was lacking in perspective because it did not take into account relevant material outside the law. The Realists believed that it was "essential for an understanding of judicial behavior that the student look beyond the words of the opinion to the social and psychological forces which were at play upon the judge as an individual, and upon the institutional and professional system at the time of the opinion."[35] This undoubtedly meant that more of what was known in the social sciences should be brought into the law school.

Third, legal education using the case method "places too great an emphasis upon the appellate case. ...Yet a number of the most challenging and important aspects of the lawyer's job never come before an appellate court."[36] Another problem with using only appellate material is that the model being studied is oversimplified, that is, it is "a body of material which has already been filtered, organized, and structured by the judge."[37] Left out of the case analysis was a vast area of lawyering and judicial decision-making prior to the appeal. The multitude of factors which induced an earlier jury or judge to reach a decision were ignored because little of this information was set forth in an appellate opinion. The reasoning skill allegedly being developed was limited to a very narrow model.

Fourth, the case method did not capture much student interest. "Many students...become bored at the lack of challenge during the second and third year of law school. The pedagogical juices of the case method have largely been squeezed out after the first year of the traditional curriculum"[38]

Fifth, the method was termed "aggressive, demanding, and destructive of group cohesion."[39] Although this was more of a criticism of the interaction generated by the Socratic method, the criticism was launched against the case approach as well. Many believed that asking pointed questions about cases only fosters hostility and unnecessary competition among the students.[40]

Sixth, and perhaps the most important objection of all, the case method did not relate to the practice of lawyering. Typical of a point of view expressed by many lawyers and judges was that of Robert Keeton's: "At least hundreds of times I have heard from friends in the trial bar that the law schools are failing in their duties, since they do not turn out graduates who are capable of trying lawsuits."[41]

For most of the twentieth century, courses in experiences in the practice of law were "minor and subsidiary,...always a mere supplement."[42] However, in 1921, the desire for more training of a practical nature in the law school received considerable notice. A group of legal educators in the American Bar Association, encouraged by the American Association of Law Schools, sponsored a comprehensive review of American legal education and received their funding from the Carnegie Foundation. Director of the project was A.Z. Reed. In his final report in 1921, Reed discussed the merits of the old apprenticeship system. Although he did not go as far as urging the establishment of clinics as Jerome Frank later urged, Reed did suggest a greater blending of practical and theoretical training in the law school.

Gradually, Reed's ideas became more acceptable and law school students began being afforded the opportunity to gain more practical insight into legal problems. "An increasing number of courses with a more pragmatic orientation found their way into the standard law school curriculum."[43] The bar and the bench continued to oppose case classes in favor of the study of "law in action" or "learning by doing."[44] Legal Realist Jerome Frank stated the point as follows:

> Something important and of immense worth was given up when the legal apprentice system was abandoned as a basis of teaching in the leading American law schools. This does not mean that we should return to the old system in its old form. ... But it is plain that, without giving up entirely the case-book system, ...the law schools should once more get in contact with what clients need and with what courts and lawyers actually do.[45]

Jerome Frank's writings bristle at Langdell for confining students to case law and not allowing them to engage in the dynamics of problem-solving and decision-making. Yet he also knew that change by the law schools was not forthcoming since so many law school faculty had never practiced law themselves.[46] Frank saw the Langdell spirit choking American legal education. He and another Realist, Karl Llewellyn, often drew analogies to other professional disciplines in their attempt to demonstrate the need for practice. The most common comparison was to the medical profession. Frank asked: "What would we think of a medical school in which students study no more than what was to be found in such written or printed case-histories and were deprived of all clinical experience until after they had received their M.D. degrees?"[47] He also compared case class students to "future horticulturists confining their studies to cut flowers, architects who study pictures of buildings and nothing else,...dog breeders who never see anything but stuffed dogs."[48] Llewellyn found "the theologian receiving instruction not only in his doctrine but in how to build sermons, how to handle parish problems, and the like."[49] In sum, they staunchly believed that law students should be given the opportunity to see and get involved in legal operations and they thought the best way to do that would be to establish legal clinics where students learned practical skills. This revolutionary idea attracted relatively little attention when it was first proposed.

The drive to make the curriculum more practical continued[50] and still continues today and "law schools...remain torn between the influence of Dean Langdell and the Realists. ... The resulting tension has been diagnosed...as a deep 'schizophrenia' in legal education."[51]

Practical Lawyering Skills as a Formal Part of Legal Education

To assure a better understanding of the justification of including lawyering skills as a formal part of legal education, it is probably best to attempt a description of those skills, knowing full well that there is no single prototype of the American lawyer. It is no easy task to describe what lawyers do. They all do not do exactly the same thing. Yet what is common among all is that their activities "are quite complex skill performances where trained abilities of imagination, insight, quick observation and perception, self-control, sensitivity, mental facility, attention, and good ready judgment are called upon and repeatedly tested."[52]

"The problem of defining, analyzing, and teaching legal skills is one that has long troubled the profession. ... Unfortunately, it remains true that at no time in the history of legal education...has there been a comprehensive, systematic investigation of what lawyers do, made for the specific purpose of curriculum planning."[53] Of course, it is important that these skills be defined, isolated, and prioritized in order that law schools can provide appropriate instruction in the practice of lawyering. This is a job I shall leave to legal educators. A few of them, on the basis of observing lawyering dynamics, have attempted to categorize the skills used by attorneys. After examining the similarities in their lists and observing lawyering myself, I have identified six skills which I believe are required of most practicing attorneys. Doubtless the list has considerable overlap and, in some cases, the skill identified could be subdivided into more specific operations. Nevertheless, for my purpose, I believe that the six categories identified here are meaningful.

The first skill is knowledge of the law. This consists of "an understanding of the formal body of substantive and procedural law at a given point in time."[54] In her survey of 416 members of the Kentucky State Bar Association,

Benthall-Nietzel found that of all the skills most important to attorneys was knowledge of statutory law subjects.[55] It is quite essential that good lawyers locate themselves and their clients' positions on the map of substantive law.

The second skill is familiarity with the institutional environment. This was a particular skill noted on a list provided by Dean Bayless Manning in his attempt to identify the essential characteristics of a well-trained lawyer.[56] To Manning, lawyers must be able to operate smoothly within the institutional environment in which s/he is dealing with problems. In other words, a good understanding as to how the legal system functions is important so that the lawyer can better deal with people and cut through myriads of red tape when it is necessary to do so.

The third skill is awareness of the total non-legal environment. Manning contends the lawyer should comprehend the non-legal environment as it relates to a problem at hand. "Every legal problem arises in its own unique setting of economic and political considerations, historical and psychological forces; each legal situation raises its own problems of data accumulation, ordering and weighting. .. The first-class lawyer...knows when and how to call upon accountants, psychiatrists, doctors, economists, market analysts, sociologists, statisticians, or others whose expertise can help him and his client."[57]

The fourth skill is professional responsibility. This involves the application of ethical canons to specific cases. It encompasses an understanding of ethical proscriptions which relate to all aspects of the legal profession. Lawyers must constantly be aware of their own relationship to the norms of lawyering behavior. They must understand their own personal values, the values of society in general, and what reforms may be taking place.

The fifth skill is sound analysis and judgment. A lawyer must be capable of making reasonable decisions, depending largely upon his own resources. In order for a decision to be reasonable, the lawyer must see relationships between

initially unrelated segments of the problem and then place these relationships into a total reality. The General Counsel for American Airlines believes that at the top of the list of principal skills essential to a satisfactory career in law is the ability to think in this way.[58] Sound analysis and judgment "includes issue recognition; ... strategy, tactics, and decision-making; and synthesis and generalization."[59] Explained yet another way, analytic skills are "special capacities of the lawyer to distinguish A from B, to separate the relevant from the irrelevant, to sort out a tangle into manageable sub-components, to examine a problem at will from close or long distance, and to surround a problem, surveying it from different perspectives."[60]

The sixth skill is a collection of basic technical skills. Included in this group of skills are interviewing, counseling, negotiating, investigating, reading, writing, and trial and appellate advocacy. "Each task is performed on behalf of another, namely, a client. This combination of tasks performed in a representational capacity constitute the 'role' of lawyer."[61] All of these skills were listed among the top fifteen tasks of importance to lawyers surveyed by Benthall-Nietzel. Each will be examined briefly in the following discussion.

Interviewing, particularly of clients and possible witnesses, includes diagnosing the problem. Surveys and observations by Benthall-Nietzell and DeCotiis and Steele[62] note that attorneys spend a major part of their time in such interpersonal contact with others. Counseling involves a complex and often intense human interaction between lawyer and client. This includes lawyer recommendations and referrals as a way of dealing with disputes. Advising by the lawyer involves "an incredible amount of teaching by giving the client detailed explanations about the necessary steps to be taken by the attorney or the client."[63] Negotiating involves an accommodation of divergent interests or viewpoints. Lawyers spend a great deal of time in "low-key

discussion with other attorneys and with various legal functionaries who are housed in the courthouse..in order to accomplish a desired result for the client."[64] To do this well, an attorney must exhibit analytic skills concerning the various settlement value factors in a case and intuitive skills concerning the emotional responses of both the client and the opposing attorney. Investigating involves fact-gathering and sifting. "Fact management is a primary operating skill. ... It demands...the concrete visualization of facts and events in all their microscopic detail, seen imaginatively, and at the same time through the sharply focused lens of photographic reality."[65] Reading or legal research requires that the lawyer spend a great deal of time pouring over written material in order to "write a brief, try a case, advise a client, check a contract, or become informed about the science or technology of the legal problem."[66] Writing might involve the packaging or a business arrangement of planning one's personal affairs. In other words, this entails the drafting of legal documents such as contracts, agreements, pleadings and briefs. To do well here, "the lawyer must write clearly, carefully, and easily."[67] Trial and appellate advocacy requires both considerable preparation as well as the development of numerous public communication (rhetorical) skills for an effective appearance in the courtroom.

All six skills described above are used by lawyers in the resolution of legal problems. While many of the skills are not unique to the practice of lawyering, they are, nevertheless, transformed into use in law practice. It should be noted that there is a common substance or theme underlying all six skills, particularly the basic technical skills. It is the ability to communicate effectively. Lawyering involves social interaction with others. To be an effective lawyer requires "a sophisticated awareness of how humans are likely to act or react in any given situation;...very high-level abilities not only to communicate, but also to perceive the full range of what is being communicated by the parties; and finally,...a good knowledge, intuitive or acquired, of the

psychology of communication and persuasion and upon a repertoire of specific communication and persuasion techniques which can be used in or adjusted to various situations."[68] This statement implies that these skills can be taught and acquired. It also very clearly posits the notion that communication (rhetoric) must be understood as the theoretical foundation for understanding how humans act in stressful (legal) situations. The following quotation further supports the notion that lawyering is a communicating profession:

> Fundamental to the broad spectrum of the lawyer's work is the art of communication - communication both sending and receiving, communication in the relatively informal setting of...interviewing...clients, witnesses, or associates, communication in the relative formality of the courtroom, communication in the negotiation process, communication (perhaps to an unidentified audience) through the written word. ... Nor, as we have recently been made aware, can the subtleties of non-verbal communication be ignored.[69]

These, then, are the critical lawyering skills. Knowledge of the law, familiarity with the institutional environment, and professional responsibility must be taught by the legal educators themselves since they are the experts in these skills. Awareness of the total non-legal environment should be taught primarily by legal educators, but certainly with the assistance of those in other disciplines (e.g., business, the social sciences, and medical professionals). Sound analysis and judgment can possibly be taught through case methods, but the case approach is not the only pedagogy for learning this skill. Finally, there are the basic technical skills. Certainly communications experts can assist legal educators in teaching these skills, but, as was noted earlier, there remains considerable tension in legal education about whether or not these practical skills can and should be taught in law schools. Let us look at both sides of this question more closely.

<u>The opponent viewpoint</u>. The complaints against practical legal education are legion. Many of the so-called arguments are mere snipings without substance, but some of the following positions are legitimate and deserve concern by

skills-training proponents. The objections seem to be most often expressed by traditionalist academicians who are not willing to change law school priorities. There is a conservative fear that something new may take over and toss all the cherished methods overboard. I have been able to identify fourteen arguments amplifying the opposition point of view. They are presented in no particular order.

(1) Some see skills training "as a return to apprenticeship and a step into the past."[70] Although this "evil" is not particularly well verbalized, there is a fear that the battle away from the apprenticeship method was too difficult to send legal education back to those "grim days" once again.

(2) "Some law school professors have not been enthusiastic about the inclusion of trial advocacy [and other skills programs] in the law school curriculum regarding it as an inferior form of vocational education."[71] Law professors generally object to the trade school label, seeing it as mundane and debasing. This "feeling" that skills training portend the demise of university law training is at the heart of the dichotomy between "theoretical" and "practical."

(3) There is no solid evidence that basic legal skills can be taught. One authors claims: "I have no reason to believe that the alumni of those courses will be found in any greater proportion among the best advocates than among the poorest. ... The notion that the study of [skills] is a determinant of high or low quality performance in the...courts is not only unproven, it is also improbable."[72] Another writes: "Experience cannot be bottled. No amount of formal courses, seminars, or moot court activity will produce an experienced trial or appellate attorney."[73] Skills may be neither teachable nor testable.

(4) There is neither a well identified body of theory for nor a widely accepted method of teaching legal skills. "Skills are, well, just skills. That is to say, there does not appear to be any body of intellectual knowledge related to lawyering skills or any well developed notions of what comprise them. There seem to be no rules to be applied, no general interests to be analyzed or balanced, no need for the lawyer's logical knife."[74] There may well be as many goals for skills education as there are skills instructors. Of course, with a variety of goals comes a variety of teaching formats, thereby leading to pedagogical confusion and lack of direction.

(5) The university law schools should not be called upon to provide it [practical training],"[75] but rather "it should be taught elsewhere,...either before or after law school."[76] As long as such options exist, undergraduate instructors and the practicing bar should assume a major responsibility for training neophytes in analysis, reasoning, and skills of the bar.

(6) "The law school curriculum need not be related to practice because a number of students who enter the profession will not practice."[77]

(7) Because of the youth and inexperience of the law student, "cynicism may be the actual result rather than social sensitivity from early exposure to the troubles and woes of clients."[78]

(8) The teaching of legal skills is the equivalent of teaching "manipulation." Learning the "tricks of the trade" as part of one's schooling will only foster "the exploitation of the unconscious fears, hopes, etc. of another person."[79] This means that the lawyer might use his or her knowledge of skills for bad ends or in bad ways.

(9) Much of the skills training is offered in legal clinics for the poor. Yet the skills learned here may not be what is needed later because "poverty case experiences are not...transferable to private practice."[80]

(10) Law schools have just three years to train their students and can only hope to begin a lawyer's legal education. There is so little time to teach substantive law and other matter, there is no time to insert a more practical approach into the curriculum. Furthermore, if the skills training takes the form of clinical work, this absorbs even more student time and presents scheduling difficulties for students who are trying to take more traditional courses at the same time.[81] Put crassly, one author writes: "With so little time to develop intellectual discipline, it must not be frittered away in fiddling with the copying of legal forms, learning the court clerk's first name, and other minutiae of 'raw vocationalism.'"[82]

(11) Faculty time is absorbed in great quantities by having to supervise student practice. The objection is either that too much faculty time is consumed by observation and evaluation or too little time is spent and the result is inadequate supervision.[83]

(12) Faculty who place more emphasis on the practical than on the theoretical tend to publish less academic research. This hurts both them and the institution which they serve. "The formal rules of promotion and tenure in many law schools support the traditional scholar's role by requiring research leading to publication."[84] This puts the skills teacher in a personal bind - either teach poorly and be an effective scholar or teach effectively and not get promotion or tenure.

(13) Practical training is too expensive. "A legacy of the Langdell system was large classes, and the understanding among university administrators is that law schools are cheap and can even be used to make a profit to help support other parts of the university."[85] Some schools claim they have even found it financially impossible to implement and maintain effective skills programs, particularly during a time of educational retrenchment. Money for materials such as videotapes, services, and administration, makes skills programs

appear unfeasible.

(14) Law school faculty are not equipped to teach practical courses. They often have little experience with skills and no pedagogic grasp as to how to teach them to others.[86]

How strong has the opposition been? The answer is "quite strong." This is seen in the fact that "the majority of legal educators generally prefer to retain a more traditional, theoretical approach"[87] in law school. Students receive training in the lawyer's techniques "only on a haphazard basis."[88] "Today, more than a century after its introduction, the case-Socratic method remains the prevalent mode of law teaching."[89]

As we review the basic technical working skills, we find little attention to any of them in the law school classroom. "The problem of interviewing clients ...is generally left to be learned after law school."[90] "How to counsel...and negotiate...are not...systematically taught anywhere."[91] Investigation or "the problem of finding and marshalling facts...is rarely part of traditional programs."[92] "Legal education today puts very little emphasis upon 'practical' skills, offering training only in reading and occasional writing."[93] Finally, the teaching of advocacy in law school has also been largely overlooked. One writer said that trial skills have been given a "step-child status,...a sad fact that many law schools either do not give enough attention to the student, or cannot allocate sufficient time for the course."[94] Another wrote: "For many years law schools took a rather indifferent view toward training trial lawyers. ... Many schools did not offer trial adovcacy courses. ... Much of that heritage is still with us."[95]

Nor is there much of a remedy in turning to clinical education programs which reside outside the traditional classroom setting. "Clearly clinical education has not been truly incorporated."[96] Many refuse to accept it as a legitimate law school function and clinical programs reach only a minority of law

school students. More will be noted about clinical education later in this paper. Suffice it to say for now that "its effect...is only...more than insignificant but less than substantial."[97]

Most law school faculty therefore neglect training their students in practical skills. In addition, "bar examinations typically do not involve questions concerning practice, experience or practical skills."[98] Finally, "the 'goat-sheep' barrier which exists between traditional classroom work and clinical experience invariably results in the denigration of the clinical program. Clinical faculty are rarely accorded the same professional respect (or monetary status) as their classroom counterparts."[99] A recent survey showed that "those who work exclusively in the clinic have titles such as adjunct professors, clinical directors, clinical instructors, clinical professors, instructors, lecturers, and staff attorneys. Very few are provided with a professorial...title. ...Only 14%...are on a tenure producing track."[100] Law school professors with an interest in theory are the respected faculty; law school teachers with an interest in practice are "mere clinicians." The former group are tied more closely to the university hierarchy; the latter group have closer connections with the profession. No wonder it has been difficult for some schools to find both committed and competent people to assume positions of teaching legal skills.

The proponent viewpoint. Statements from the bench and bar, well covered by the media, have brought into sharp focus the problem of insufficiently skilled lawyers. Perhaps remarks made through the years by Chief Justice Warren Burger have received the most attention. He has said that anywhere from 25% to 75% of all practicing lawyers are ill qualified in basic skills.[101] Statements by others in the profession have been as follows: "Almost everyone who discusses ...young law school graduates has an unkind word to say about their lack of adequate powers of oral and written expression in their native tongues."[102] "I

contend that the Art of Advocacy in the legal profession is, and for some years has been in a definite and progressive decline."[103] A survey by the Federal Judicial Center of trial judges who rated almost two thousand lawyers in practice, concluded that "the performance of one in twelve of trial lawyers was very poor, poor, or less than adequate."[104]

It cannot be ignored that the practice of law is a skilled craft. Those skills were outlined earlier in this paper. Lawyers must be more than individuals learned in the law and related disciplines; they must be proficient in the skills inherent in the practice of law. They must learn what the skills are and how to put them to work. "The young attorney who fails in this is as helpless in his practice as a dentist who recognizes a cavity but doesn't know how to fill it."[105]

The most serious problem with a bar that is weak in skills is that the public suffers. Justice Clark said: "Any effort falling short of providing a substantial body of competent trial attorneys will ultimately take its toll on our system of justice."[106]

The proponents of skills training in legal education therefore turn to the complete list of lawyering skills and urge the development of a more well-rounded training program for entering members of the legal profession. For instance, Walter Probert sadly laments how interviewing and counseling skills are essential for a lawyer to know because they spend so much time in practice using these skills. Yet, he reports:

> One of the most grievously undertaught skills in legal education is what has been called 'legal interviewing and counseling.' ... For instance, a fairly common reaction from some quarters is that a law school course on the psychological aspects of the lawyer-client advice-counsel relationship may be bad because it can encourage lawyers to try to be psychologists when they ought to stick to being what they are trained to be. But the truth is that there are many situations in which lawyers play at psychology without realizing it. ...Lawyers do need to have greater sensitivity to the emotional level. The best route to that level is through training sensitive to communication dynamics.[107]

Probert's conclusion brings us back to what I earlier identified as a common substance or theme underlying lawyering skills, namely, the ability to communicate effectively. There is considerable supporting evidence offered by the proponents of skills education that communication be the focal point in training programs. Some of these opinions are noted in the following quotations:

> Ability to make use of the spoken word may be one of the lawyer's principal assets. Just a glance at some of the activities of today's attorney show that his effectiveness may be limited by his ability as a speaker. .. An ability to communicate and to 'handle' clients with persuasive speech is very helpful.[108]

> I realize how much of a lawyer's work is involved in dealing with people - listening to clients, developing rapport with them, handling them,...persuading judges or opponents, and so on. ... The skills of the successful lawyer lay in mastery of the human interaction - ... how to listen, how to persuade, how to meet emotional and psychological needs of clients, opponents, judges, indeed everyone they dealt with professionally.[109]

> Effective communication between the judge, lawyers, witnesses, and jury is critical to the proper functioning of the system. It is self-evident that if the communication process is not effective - if jurors are unsure about the evidence, unclear on the meaning of the law, confused by legal jargon, bewildered by trial procedure, uncertain of the role they are to play - the jury cannot be expected to perform its function intelligently. ... Such a condition of pervasive confusion...is largely a result of poor communication.[110]

Practicing lawyers confirm the need for skills training in law school. Benthall-Nietzel found that law school alumni strongly endorsed the teaching of communication skills in law school:

> Interpersonal skills such as interviewing and counseling were ranked as highly important to the practice of law. Understanding human behavior was also ranked among the top five skills. ... Survey results showed that attorneys spent large amounts of time in three general task areas: litigation-oriented tasks (23.7%); writing tasks (32.3%), and tasks involving interpersonal skills (23.3%). These data suggest a further need for skills courses.[111]

One lawyer writes: "There is not a single lawyer with whom I went to law school who feels that his legal education adequately prepared him for the practice of

law. ... My experience was sobering. Trying to reconstruct an incident from interviews,...plumbing the subtleties of the plea bargaining process, learning the nuance of communication between judges and attorneys, I suddenly became aware of the unforgiveable irrelevance of my legal education to what was happening in my head...and in the courtroom."[112] He is not alone. A survey of the Illinois bar taken in 1968 indicated that "Illinois lawyers generally believed that they would have been better served by more practically oriented courses in law school."[113] Another study by the American Bar Foundation in 1976 found that most law school graduates believed that law school failed to provide them with practical professional information.[114] A recent poll of 1,600 law school graduates by the Law School Admission Council showed that a significant percentage of them professed dissatisfaction with their legal education because they had no basic skills preparation.[115]

What, then, is being done by the proponents? In recent years, they have been pressing vigorously for some portion of legal education to be devoted to the student's applied learning of skills. Some want a national examination on practice as a prerequisite to admission to the bar. Others want various kinds of practical experiences in law school as a requirement for admission to the bar. These proposals are a long way from reality and it is doubtful that they will reach fruition in the near future, if at all. What is occurring, however, is a gradual change in the law school curriculum with an increasing emphasis on a more practical education. The President of the Council on Legal Education for Professional Responsibility (CLEPR) has called for 80 percent of the first-year law school curriculum, 50 percent of the second-year, and no more than 20 percent of the third year devoted to "theoretical" work with the remaining time spent on a more "practical" education.[118] The Chief Justice of the United States has recommended that the third year of law school be devoted entirely to advocacy skills.[117] Although no law school has probably reformed itself as far as either man has suggested, there is a gradual move toward more practical law school education. The next

section explains the nature of skills training in law school in greater detail.

The Nature of Skills Training in Law Schools Today

In general, law school skills training has been a response to the perceived gap in legal education resulting from an over-use of the case method. As far back as the 1950's, attempts to blend the practical and theoretical approaches in a law school surfaced. Some schools intiated moot court programs; others had "practice court" courses with academic credit; still others established legal clinics.[118]

In the early 1960's, the Civil Rights Movement was quite popular in the United States and law careers were beginning to be attractive to social activists. "When in the mid-1960's, O.E.O founded its Legal Services Program, the law school became a place 'where the action was.'"[119] Through this program, services were provided to indigents for both civil and criminal legal problems. As a result, law schools were encouraged by the government to develop credited clinical programs under law school faculty supervision, which involved student-client interaction. The Council on Legal Education for Professional Responsibility (CLEPR), established by the Ford Foundation in 1968, made "short-term grants of funds to law schools to establish clinical and other experimental programs having to do with the promotion of professional responsibility."[120] The chairman of the Council was William Pincus, called by some the "conceptual father of the clinical movement." By 1972, CLEPR had given over four million dollars to nearly one hundred law schools, thereby giving clinical legal education a real boost.[121]

During the 1970's the clinical phase of legal education grew enormously. In a survey of nearly two hundred law school deans, review editors, and student bar presidents, roughly ninety percent maintained that lawyering skills can and should be taught in law school.[122] The result has been that there are over 420 separate clinical education programs in forty-nine different fields of law.

Approximately ninety percent of all American Bar Association approved law schools currently offer some form of clinical education for credit.[123] In addition, "clinical legal education has moved from the narrow criminal and poverty concepts of which it was originally associated. Now many clinical courses neatly parallel and compliment those courses found in the traditional law school curriculum."[124] The casebook method and skills training are beginning to co-exist.[125] However, in spite of this movement toward more practical training, a minority of law school students are receiving the benefits such training has to offer. In a 1975-76 survey of 110,000 students, Pincus discovered that only 24 percent of them enrolled in skills courses and/or programs.[126]

Let us look next at some of the methodologies used to teach skills to law school students. Perhaps the least costly and least successful way to teach lawyering skills is the lecture method. Students become "exposed" to a series of legal operations, but never get involved in actual practice and evaluation. This makes lectures "of limited value."[127] As a result, "the lecture method is generally not found in...clinical teaching."[128]

Another methodology is student observation of professors and/or practitioners. "Observation...provides the student with an example to emulate and criticize in the context of pedagogical dialogue."[129] This approach can help the student more fully understand the functions and roles of the legal profession, provided there is someone who can effectively analyze and explain the various intricacies of the observation(s). Pre-recorded material on video or audio tape is often used.

The final methodology, both costly and potentially most effective, is student performance followed by evaluation. There are two settings in which students can perform: the simulated setting and the real setting.[130] A discussion of both approaches follows.

The Simulated Setting. Simulation is like a game or an acting performance. Law school students act as lawyers and perform lawyer roles in case study problems.

Criticism of simulation focuses on the absence of a real client. Normally, the legal educator selects problems which are as close to the real world as possible. Then he builds models around a theory or set of theories regarding the real legal world which are "capable of being insulated, manipulated and examined in the simplified environment of the simulation. Without articulated theory about the real legal world, the simulation model cannot guarantee that either the clinical teacher will teach or the student will learn anything about lawyering."[131] Harbaugh has identified eight basic steps the clinical teacher should go through in building a simulation model.[132] Even with careful planning, the first few runs may be rough. The exercise may be too long, too short, too complex, too simple, too unrealistic, etc. "In those instances, the teacher is forced back to the drawing board to redesign the simulation. This time, however, the instructor has the benefit of a field test and improvement is likely to occur."[133]

Simulation offers several unique advantages. First, the opportunity for repetition and correction by the student in the classroom under proper supervision makes it highly desirable. The student can be videotaped, which is "...extremely helpful to educational efforts."[134] Second, immediate feedback (unlike the real setting) provides the opportunity for the student to more easily synthesize what he has learned. Third, the rights of "real clients" are not jeopardized by inexperience. Fourth, it is conjectured that practicing tasks in simulation exercises significantly reduces anxiety during a subsequent real situation.[135] In sum, simulation is supported as an effective way to learn lawyering skills. It is used in four contexts in law schools: interviewing

and negotiation courses, trial technique courses, law firm operations courses, and moot court.

Interviewing and negotiation skills are sometimes taught together as part of the same course. For our discussion here, however, they will be examined as separate courses.

In 1973, the Section on Legal Education and Admissions to the Bar of the American Bar Association recommended that all law schools offer training in the legal interview. Their reasoning was that the attorney-client interview "is the focal point for almost all legal problems handled by practicing attorneys."[136] Although such training is not offered in all law schools, a recent survey of over one hundred law schools shows that 26% of them have courses in legal interviewing and counseling while another 22% said that these skills were taught in other courses.[137]

Both law school faculty and/or visiting lecturers are used to teach interviewing courses. Usually students observe and discuss taped interviews before conducting simulated interviews based on information given to all participants. Later the interview is critiqued in seminar sessions with both theories of law and interviewing skills as frames of reference. The interview experiences become progressively more difficult and each experience is followed by an opportunity for repetition.[138] The videotape system is key to capturing what happens in class so that the student lawyers and clients can see themselves in action.

It is interesting to note that many of the skills are tied to communication theories, especially those that facilitate rather than inhibit the flow of information. Referring to his interviewing course at the University of California at Davis Law School, Goodpaster notes that it is "based upon communication...interaction models. It attempts to teach students perceptual, sensitivity, and judgmental skills through exercises and practices which give students

insights into the nature of human communication."[139]

One particular communication skill taught in interviewing courses is fact-gathering from questioning. "Good interviewers...know quite well that the form of a question tends to dictate the emotional response of the person interviewed and the form of the response to the question."[140] It is possible to devise simulated exercises which train students in the use of varying forms.

Another skill taught in the interviewing course is listening. It has been found that many lawyers do not listen carefully and therefore fail to make an accurate assessment of their clients' problems. Listening is essential for understanding the case.

Non-verbal communication is also stressed in interviewing courses. "Any inconsistency between verbal and nonverbal communication...can provide valuable clues to a lawyer in his probing a client or witness."[141] Unfortunately, many lawyers are usually not conscious of the conclusions they may be able to draw from nonverbal information.[142] In a course taught at Temple University, a series of simulated exercises are designed to teach students that they sub-consciously use nonverbal symbols and that they can learn much from identifying nonverbal symbols used by others.[143]

The skills noted above are only a part of a complex set of skills related to interpersonal communication theory. This body of knowledge is useful to the lawyer when counseling, which is "the process of communicating with the client accurately and effectively the validity and condition of the case, its strengths and weaknesses, alternatives and consequences, and the ability to lend this professional guidance while enabling the client to make the essential substantive decision about the case."[144] The lawyer must develop awareness skills in order to "perceive quickly and objectively the nature and personality of the client and the character of the ongoing attorney-client relationship."[145]

By doing this, the attorney can foster rapport, trust, and confidence. Once this atmosphere has been created, it is much easier to advise the client concerning courses of action.

It is equally important for a lawyer to have negotiation skills. A high percentage of cases are ultimately resolved by negotiating rather than litigating. However, since many students are often reluctant to negotiate cases for a variety of reasons, "it must be emphasized that settlement short of trial is a legitimate tactic capable of doing justice to both parties."[146] Once this point has been made, the task of teaching negotiating skills is approached. After models of negotiated settlements are studied, students are paired off to bargain with one another. Proposals and counter-proposals are rejected, modified, or accepted. Arguments are advanced and refuted. The rest of the class listens and takes notes in order to present written and/or oral critiques. In a "post-mortem," participants watch and evaluate themselves from videotape.[147] In evaluating the oral negotiation, "the following factors are considered: command of the facts; perception of the limitations on bargaining;...manner, poise, self-control, and voice; organization and plan of presentation; clarity; effectiveness on offense and defense; dialectical skills;... and mobility in adjustment."[148] Note once again how much of this phase of a lawyer's work is dependent upon an understanding of certain communication skills. Although the bargaining is simulated, the learning of these skills is taken quite seriously by the students involved. Two instructors at Drake University who have taught negotiation observe:

> It was found that, although the groups initially treated each problem as a friendly game, including feigned emotional reactions, they became more and more emotionally involved as the sessions progressed. ...Within a short period of time, ...the students were involved in a bargaining process with all or most of its concomitant emotional reactions.[149]

Trial technique courses are offered in most law schools. This has been confirmed both by an examination of law school catalogues[150] and the Berryhill survey cited earlier.[151] The goal of such courses is to concentrate directly on advocacy skills, giving students a chance to prepare for trial and actually act out cases. Learning trial skills in a simulated setting is intended to instill an awareness of the problems faced by practicing lawyers and to equip students with the tools necessary to plan and implement solutions. "The understanding and effective use of the skills of trial advocacy...and/or understanding of trial tactics and strategy are essential to the development of the total lawyer."[152]

The trial technique course is generally taken by third year law students, although there is some consideration to it being taken during the second year in order to better prepare the student for legal clinic work. "The basic litigation course is a natural building block course for clinical education."[153] However, such a course cannot be taken too early in the student's program because it is essential that the student have had courses such as civil and criminal procedure and evidence prior to taking the trial technique course.

A trial technique course usually begins with pre-trial activity. Here is a brief description of that activity in the Practice Court course taught at Notre Dame Law School:

> The role of witnesses or clients are played by ordinary citizens within the community. ...The students contact the witnesses and clients, interview them, prepare pleadings on the basis of these interviews, [and] make pre-trial motions if appropriate. ...Briefs and proposed jury instructions are submitted in advance to the judge, who is in fact a real-life trial judge.[154]

Jury selection (voir dire) is also a part of the pre-trial activity.

Next, the classroom emphasis shifts to the trial itself. In a University of Southern California course entitled "Criminal Trial Advocacy," instructors Bellow and Johnson have students alternately portraying prosecutors, defense

attorneys, and witnesses. Each practice court session "is presided over by one of the instructors who acts as both trial judge and commentator."[155] In the Loyola of Chicago Trial Advocacy seminar, Professors Morrill and Tornquist require each student to "personally conduct as many trial exercises as possible,"[156] thereby stressing the "learning by doing" approach. At Western New England Law School where I offered assistance, students were given repeated opportunities to engage in specific aspects of trial practice (e.g., using charts and chalks, cross-examination of expert witnesses, etc.) before serving as counsel in a full trial.[157] Full trials culminate the course and each of them contains the following ingredients: a genuine factual dispute, challenging substantive law problems, significant evidentiary and procedural difficulties, witness difficulties, even balance, and the capability of being tried in approximately one-half day. After the trial, the jury (usually undergraduates, local citizens, or first-year law students) deliberates. While the jury is out of the courtroom, the presiding judge (usually the course instructor) critiques the case with opposing counsel or counsel "teams." The critique is often done while reviewing segments of the trial from videotapes.[158] In order to give a thorough critique, the judge/instructor takes notes during the trial and relies on the notes in offering constructive comments at the end of the trial. Feedback must be prompt and reasonably specific in order to be meaningful for the students.[159]

Once again, it should be noted that a significant portion of a course in trial technique focuses on theories of communication/persuasion/argumentation. Lawyers, not speech professionals, claim that "students in a trial advocacy course should actively apply...principles from other academic disciplines such as public speaking."[160] Other lawyers note that "an attempt is made to apply theories of persuasion and attitude change to decision-making and practice in the trial context. ...Particular attention is paid to the dynamics of formal argument, the uses and misuses of rhetoric and logic, [and] the psychodynamics

of persuasion."[161] The instructor of the Basic Legal Techniques course at Catholic University spends time teaching oral argument as a way to develop a sense of appreciation of the adversary system of oral persuasion.[162]

Material containing exercises for trial techniques courses comes from a number of packaged sources. Popular ones are collections prepared by the National Institute for Trial Advocacy (NITA) and the Court Practice Institute (CPI). Some instructors even use information contained in actual investigation reports and interview sheets from a local District Attorney's files.[163] Student reaction to these courses is generally quite good and simulation seems to be working well. One faculty member teaching a trial techniques course at Hofstra University concluded: "To those who believe that a simulated courtroom could not match the intense anxiety of the real thing, I can only suggest that the struggles which went on in our courtroom were very real indeed."[164] From my own observation, I certainly agree with the point of view that student enthusiasm and performance are outstanding.

Law firm operations courses are not yet widespread. One such program has been developed at the State University of New York at Buffalo Law School. It is a course for second-year law students combining interviewing, negotiation, and trial technique into one program. The course at SUNY-Buffalo is called Simulated Law Firm (SLF) and is described as follows:

> The SLF adopts the concept of the law firm and courtroom as the center of student learning. ...The activities of the various student-faculty-practitioner simulated law firm groups evolve on a case-by-case basis much as the activities of actual law firms do. Student associates handle simulated cases from the initial interview with the client, through a hearing before a judge, and on to the closing of the file. ...The course...simulates an actual law firm including a managing partner, senior partners, and associates. ...In the SLF the 'student associates' are welcome to seek the advice and counsel from senior partners and managing partners of the firm but the advice is of a consultative nature only. The ultimate decision as to the procedure in the case rests with the student. ...A case was initiated when clients, played by first-

> year law students, contacted the associates in each firm and arranged to come to the 'law office' for an interview to discuss their legal problem.[165]

The case can be settled by counseling, negotiating with opposing counsel, or going to trial before a presiding judge. Students surveyed seemed to appreciate the SLF courses and, in one instance, SLF students competing against non-SLF students demonstrated greater proficiency in several lawyering skills.[166]

Moot court may well be the primary method in law schools today to teach practical lawyering skills.[167] In his survey of 109 law schools, Nobles discovered that moot court participation was standard in all of them.[168] In most institutions, however, it is an extracurricular activity. Only 45 of the 119 responding law schools grant credit for moot court competition,[169] and "...in less than half of the law schools are such programs requirements for graduation."[170]

Moot court involves the actual preparation and trial of cases. "A record is prepared...with pleadings, trial transcript, and decision by trial judge. ...The student lawyers are expected to brief the case for one side and to argue it on appeal before a panel of judges."[171] The goals are to familiarize students with brief drafting, preparing an appellate record, and competence in oral advocacy. The highly successful Wake Forest program claims that its moot court is especially valuable in introducing the students to trial practice and real-world litigation problems.[172] Yet there is skepticism about moot court as well. The two major criticisms are that (a) moot court is limited to arguing only at the appellate level and (b) "moot court...is supervised by senior law students who often feel unprepared for the role."[173] The thrust of this second criticism is that "any instruction in the nature of correction...directed toward eliminating faults in the manner of speaking is merely incidental and cursory."[174]

In all four methods of simulation, the student is not working with current "real problems." Some believe "exposure to real problems may lead to a better

student recognition of the relevance of classic legal education as a necessary base for the resolution of real problems."[175] Thus, a real setting for student performance has been created at many law schools.

The Real Setting. Often referred to as the clinical setting, the major goal of this approach is the development of lawyering skills through field-work. In his survey of clinical programs, Pincus discovered that the areas receiving special training closely paralleled the basic technical skills lawyers must possess. The table below lists skills and the percentage of clinical programs giving special attention to those skills:[176]

Skill	%
Interviewing	65
Fact-gathering and investigation	65
Counseling	54
Negotiation	54
Trial practice	53
Motion and pretrial practice	49
Legal drafting and brief writing	47
Professional responsibility	41
Appellate practice	20

In a somewhat more recent and slightly different survey, the Council on Legal Education surveyed 468 programs to discover what training experiences were available to clinical law students:[177]

Forms of Training	# of Programs	% of 468 Total
Interviewing	312	66.7
Fact-gathering and investigation	300	64.2
Drafting and brief writing	287	61.3
Negotiation	273	58.3
Motion practice	262	55.8
Trial practice	256	54.5
Counseling	245	52.5
Professional responsibility	160	34.1
Appellate practice	93	19.8

The results of the two surveys are quite similar and do indicate what is stressed in clinical or real setting programs today.

Typical of these programs is the clinical term at the University of Southern California which occurs during the fourth, fifth, or sixth semester of

law school. Students participate in direct client representation in civil and criminal cases either while or after they take courses which use simulated exercises regarding various lawyering tasks. All students actually prepare, present, and argue their own cases, both in court and during pretrial negotiations.[178] If students at the University of Wisconsin who went through such a program are typical of law students in general, "the real setting" is apparently accomplishing what it is designed to do. The students there "were unanimous in the belief that they had in fact acquired practical skills."[179]

Admitting students into courtroom practice is at the discretion of each state. In 1909, Colorado was the first state to allow this practice. Court appearances by law students are currently allowed in most states as long as the students are under careful supervision of attorneys and officers of the court.[180] It appears as though the courts have concluded that well-prepared students are perfectly capable of trying most cases. In a survey of forty-nine judges, Rubin found that (a) clinical students are as well prepared as the average practitioner and one out of every four judges found the students better prepared, (b) in those courts where students prepare pleadings, their documents were considered average to superior, (c) student briefs were rated average to superior and none were below par, (d) 75% of the judges found the students' oral arguments average; none found them superior; 25% found them inferior; and (e) only two of the 49 judges found inadequate representation to clients whereas the rest considered student representation to be competent.[181]

In order to provide competent representation, considerable supervision of the law students is required. It must be carefully coordinated by clinical faculty, practicing attorneys, and the bench. In addition to a continuing review of the students' work, feedback on and reinforcement of performance is essential. Three types of real (clinical) settings can be found: in-house clinics, law offices established outside the law school environment, and outside agencies.

In-house clinics have the clinical faculty acting as counselors, negotiators, and litigators with students assisting them in a variety of ways. The law school itself operates a law firm within the law school, "utilizing full status members of the faculty as 'senior partners' whose whole time is devoted to the supervision of the student interns who practice within the firm."[182] In this atmosphere, the student undergoes highly structured and supervised legal experiences. In his 1975 survey, Pincus found that 32% of the law schools have a law office within the law school where clients, students, and supervisors are working in a service setting.[183]

Law offices established outside the law school environment provide the second "real" setting for students to practice lawyering skills. These offices are to all intents and purposes community legal aid offices "removed from the school and under the supervision of attorneys employed either full or part-time by the school, but with little or no status as members of the law school faculty."[184] Pincus found that 13% of the law schools locate their students in this kind of clinical program.[185]

Outside agencies are the most popular program design. Forty-five percent of the law schools in the Pincus survey place their students completely outside of the school in some agency offices.[186] This would include legal aid, public defender, district attorney, and other such agencies. "In this form the supervision of students is turned over to the attorneys in these agencies."[187] It may appear on the surface that this is nothing more than a revived apprenticeship system, but it is not. The difference is that outside agencies are now required by law schools to offer patient and thorough supervision over the lawyering experiences of the intern.

Three such programs are worthy of comment. "The most ambitious program of placement of students with private firms is in operation at Northeastern

Law School. There, in the so-called cooperative program, students spend full time alternately in the law school and in firms or agencies engaged in the practice of law."[188] Every student at Northeastern is required to be in this program as part of his degree requirements. Half of the second and third years are devoted to employment in a law office and are expected to meet the requirements placed upon them by their law office employers. In return, the students are paid competitive salaries.[189] Few schools have gone this far with their clinical programs. At Columbia University, students are quite active in a legal aid office in a nearby low-income neighborhood where they have an opportunity to use virtually all of the basic skills in the lawyering process.[190] The University of Oregon Law School has its first-year students observe an attorney in a legal aid agency, following a case from the initial interview until its disposition. Later in their law school career, these students have the opportunity to work in that same agency for academic credit. The student interns interview clients, investigate, plan strategy, draft documents, etc. All of the work is supervised both by the clinical instructor at the law school and one or more of the legal aid staff attorneys.[191] In this program, as with the others mentioned, students are given numerous opportunities to develop and perfect lawyer-client skills.

As skills training in real settings has grown, the nature of legal education has been altered. With clinical work, "the law school becomes a professional school. ...It teaches students how to be lawyers, how to act the answers to legal questions. This carries legal education far beyond the confines of academic teaching to the education of the whole person preparing to be a professional."[192] With this movement toward more professional education, there has been some difficulty in identifying objectives for the clinical approach. It has been the point of view in this paper that the key objective is to teach

law students how to do various lawyering tasks. However, there are those who view the clinical or real setting differently. They believe that "the legal clinic is a bastion of law reform; a place to enlist eager and able young minds in the cause of social and legal change."[193] There are also those who believe that "through the legal clinic the law school has taken its appropriate place as a factor in the machinery of justice by providing services for those otherwise unable to gain access to the legal system."[194] Are these additional service goals compatible with the educational mission of the clinic? Or do these additional goals distract from the educational mission by placing heavy workloads on students and inadequate supervision by faculty and attorneys? It is too early to tell. Bellow and Johnson note:

> Despite the growing literature,...there is little agreement either as to the appropriate function and structures for clinical programs or, more importantly, as to the purposes of contemporary legal education. ...Nevertheless, there is enough empirical evidence to suggest that further experimentation with student practice and research activity should be encouraged.[195]

What needs to be determined is the precise function of clinical education, the best models for translating that function into specific programs, and a method for evaluating the effects of these endeavors.

In spite of potentially conflicting goals in clinical legal education, one point stands out: skills training has become an increasingly important part of law school education. If students are involved in work of an educationally significant sort and if they are carefully supervised and evaluated, then skills training in the simulated and/or real setting will infuse the student with insights and tools necessary for the legal profession. The last section of this paper discusses how professionals in speech communication can assist legal educators in teaching the previously noted skills.

How Communication Education Can Assist Legal Education In the Further Development of Teaching Lawyering Skills

Although rhetoric is "not the golden key which would unlock all of the... problems of the lawyer, rhetoric would at least provide some guidance since it deals with the same kind of problems."[196] The remainder of this paper will explore avenues by which communication (rhetoric) educators can assist legal educators in the further development of teaching lawyering skills. I begin by examining some of the areas of teaching and research in speech communication which are closely related to lawyering skills.

The first area is interpersonal communication, defined as "a routine experience...in which we seem to engage automatically and yet purposefully in every day communication with others."[197] Direct face-to-face contact is the most frequent communication mode for lawyers. It is found in the interview, counseling, and negotiation settings.[198] Since semantic barriers, poor listening, lack of feedback, and omissions of content are "four major reasons for serous communication breakdowns...between attorney and client,"[199] "interpersonal dynamics...must be considered"[200] a vital area where communication education can enhance lawyering skills.

The second area is public communication. "A speaker delivers a relatively prepared, relatively continuous address in a specific setting...."[201] Speeches of this kind fall into two categories: the speech to inform and the speech to persuade. Informative, or expository speaking, is used during the opening address to a judge or jury where the lawyer is supposed to give an impartial presentation of the case.[202] A study of expository speaking encourages one to be "fair, clear, brief, informative, candid, simple, and at the same time to be forceful...and strong."[203]

Persuasive speaking is, of course, used during closing argument and in

appellate advocacy. However, some would say "the lawyer is always persuading,"[204] which includes the attempt to convince a client to accept a certain point of view. Much persuasive speaking involves making judgments about and adapting to audiences. Certainly judges and juries constitute "audiences" and the psychology of persuasion can be directly applied to the courtroom situation. It can begin with the jury selection procedure for challenging certain jurors and later adapting certain lines of argument for chosen jurors. It can end with closing arguments where an attorney should seek to discover all the available proofs which is, of course, a restatement of Aristotelian theory. In addition to analyzing the audience, a study of persuasive speaking might also ask that the student learn something about the organization and style of public messages. Since messages ought to be well organized and orderly, in the teaching of speech communication courses, an emphasis could be placed on outlining because of the definite relation to legal briefing. Since public messages should also be lucid and fluent, the student of persuasive speaking could study language in the legal setting. For instance, lawyers must be sensitive when using legal jargon when communicating with laymen who know neither the language nor the concept.

The third area is <u>argumentation</u>, which overlaps the other two areas, but examines communication as "symbolic transaction...aimed at presenting reasons for claims and/or examining reasons for claims."[205] "Argumentation certainly mirrors impressive links between these disciplines; emphasis upon research, evidence, and reasoning; concepts of presumption and burden of proof; rules of rebuttal; cross-examination--to mention but a few overlapping principles."[206] Argumentation pervades numerous lawyering tasks.

> In the interview context,...lawyers communicate with clients, potential witnesses, other lawyers, etc., seeking to work out an understanding on a question of law or settle a difference. ...Even though an attorney rarely goes to court, he will write memoranda, negotiate settlements, and generally interact with others argumentatively. When the courts do become involved, a sequence of argumentative processes takes

> place, starting with pleadings, moving to the gathering of evidence and the preparation of a case, and finally heading into the courtroom itself with opening statements, direct examination of favorable witnesses and cross-examination of opposing witnesses. The closing argument, typically thought of as the prime instance of legal argument, merely completes a long and complicated process that may have begun months before.[207]

The focus of argumentation therefore closely parallels the lawyering process. Argumentation courses traditionally explore decisions by reviewing the analysis of propositions, fact-gathering, reasoning, case-building, rebuttal and refutation, and cross-examination.

The legal community is slowly beginning to recognize the relationship of interpersonal communication, public communication, and argumentation to lawyering skills. In 1976, Mills claimed that "in the last five years or so, there has been a growing awareness in the legal community of the importance of communication and an emerging conviction that lawyers ought to study it."[208] In a 1978 survey of law schools, Stone found that 86 institutions wanted improvement of communication skills in their curriculum while only two schools did not.[209] And at a convention of the Association of American Law Schools, interest was expressed in bringing more communication subjects to law school students.[210]

There has been a reciprocating interest in law by members of the speech communication profession. Convention programs and published articles in communication journals are some indication of that interest. In addition, "new courses in...legal communication...are being introduced all over the country, and requests for sample syllabi, course materials, bibliographies, and the like are darting from place to place."[211]

In spite of this activity in communication education and legal education, a reciprocal relationship has yet to occur. Some claim there are barriers. One author concludes there might be status rivalry within and between disciplines

as well as poor interdisciplinary communication.[212] Other authors speculate that the problem might be a lack of research which studies the "interconnections between legal processes and communication systems."[213]

The resistance in law schools to interdisciplinary study comes out of the training and education law school faculty have had. Their roots have been in traditional law school teaching and this "frustrates the serious introduction of interdisciplinary knowledge because it conflicts with instilled professional cognitive processes."[214] Nor is there any rapidly developing body of literature used in law schools which relates communication behaviors with legal practice.[215] "Literature from speech communication, both theoretical and experimental, appears either unknown to, or rejected by, or neglected by, most law school faculty responsible for communication related courses."[216] To sum it up, "everybody says lawyers need rhetorical skills, but nobody does much about it."[217]

None of the barriers and problems noted above seem insurmountable. The remainder of this paper will be devoted to how lawyers can secure rhetorical skills in law schools, during pre-law education, and as a part of continuing legal education.

Law School Education. Since it appears unlikely that communications teachers will flood the law school classroom, perhaps the most profitable initial relationship with law school faculty might be to engage in interdisciplinary research with them. Shmukler maintains that "if our field is ever to make a necessary and meaningful contribution...we must first lay the pedagogical groundwork through appropriate research."[218] Although the quantity and quality of research has improved a great deal since her statement of ten years ago, much is yet to be done. Challenging research exists concerning jury deliberations, negotiation sessions, and the meaning of "effective advocacy," to name a few.

Interdisciplinary research would more closely ally legal and communication educators so that the next phase of this relationship could be team-teaching in the law school. It is abundantly clear that qualified communications instructors could bring new insights into both simulated and real course settings in the teaching of skills in law school. Based on the Stone survey, the Howard University Law School recommended "that studies in trial practice, oral argument, negotiating, and counseling be aided by a professor trained in oral communication skills--a joint venture in teaching."[220] We may be close to reality on this matter because the Nobles survey of 109 law school deans found that 45% of them would like to use speech faculty in team teaching situations for their communication-oriented courses.[221] But, to date, team-teaching is not a common phenomenon.

Pre-Law Education. Law schools are generally unwilling to specify any particular undergraduate course or major for pre-law education. It is believed by law schools, however, that "the communicative skill should be developed before admission to law school. Much of such communicative skill is not peculiar to the law and can best be taught outside a legal environment."[222]

This seems to be an open invitation to speech communication programs to respond to a challenge from the law schools. Indeed, "modern speech programs are shaped to provide liberal opportunity for all (including aspiring lawyers) to cultivate skills in research, principles of argument, and communication."[225] The basic core of courses is usually present in the undergraduate curriculum--interpersonal communication, small group discussion, argumentation, public speaking, and persuasion. Present and future needs should be a focus for additional undergraduate curriculum development.

Interpersonal communication and small group discussion courses are especially useful for legal interviewing, counseling, and negotiating. Although there are no known data on interpersonal courses, Williams has provided some encouraging

information regarding group discussion. In a survey of 37 law school deans, he found that 95 percent of them "believe that training in group discussion would be helpful to the lawyer."[224] Williams explains why:

> Group discussion courses...feature training in the principles and methods of cooperative group inquiry into stated problems. Through study and application of theoretical principles, the student learns how problems may be so defined and delimited that there is a common agreement on what the problems actually are; he learns how to detect symptoms and to determine causes of problems; he learns how various suggested solutions to problems may be appraised in light of formulated criteria; he learns how the processes of compromise and integration may serve to secure the acceptance of these solutions and to enhance their workability. In essence, he learns how to participate as the uncommitted inquirer in the group process of problem solving.[225]

Of course, this is a somewhat outdated description of what might occur in a small group discussion class, but the approach is still a valuable one. What might be added today is consideration of interpersonal dynamics within the group.

Public speaking and persuasion courses are an excellent response to the Association of American Law School's recommendation of skills development during a pre-law program.[226] They recommended language skills so as to convey meaning clearly and effectively. They recommended the development of the highest skills of expression and noted that one learns to speak by speaking. Courses in public speaking and persuasion can be designed to aid the potential lawyer as advocate.

Argumentation courses are also ideal for pre-law students inasmuch as they focus on the process of analyzing propositions, methods of selecting material for case-building and refutation, tests of evidence and reasoning, and factors of oral presentation. All the law school deans in the Williams survey, except one, thought that training in argumentation would be helpful. Forty-four percent of them suggested the proper place for such training would be in the pre-law curriculum.[227] The Association of American Law Schools

urges the pre-law student to develop proficiency in (1) research, (2) fact completeness, (3) fact differentiation, (4) fact marshalling, (5) deductive reasoning, (6) inductive reasoning, (7) reasoning by analogy, (8) critical analysis,(9) constructive synthesis, and (10) power of decision.[228] The similarity between this list and the objectives of most argumentation courses is striking. Argumentation, therefore, offers a unique contribution to the pre-law student.

Closely related to courses in argumentation are co-curricular programs of academic debate. The rigor and competition of these programs has been shown to be quite attractive to pre-law students. In a survey of 173 California lawyers, McBath discovered that 39 percent of them had been on debate teams when in college. An impressive 90 percent of these affirmed the value of forensic experience to their professional careers.[229] In another survey, Arnold learned that 42 percent of the 94 Pennsylvania lawyers he polled had participated in interscholastic debate wile 27 percent had participated in intercollegiate debate. Of those who had participated, 75 percent thought debating to be of considerable value, 22 percent said it was of some value, while only three percent thought it was of little value. None thought it was of no value or detrimental to law practice.[230] Perhaps that is why the Prelaw Handbook states: "To master English one may find it helpful to study...debate. ...Intercollegiate debate can be an excellent training ground...for speaking."[231]

In addition to the courses mentioned above, there is a growing trend toward courses with titles such as "Communication in the Legal Process" or "Rhetoric and Law." These courses are designed for undergraduate students who want a better understanding of communication and rhetorical theory as it applies to a legal setting. The courses are not designed for learning law; that is left up to the law schools. Those who teach the course recommend that this type of course best be team taught by a communication teacher and a

substantially successful lawyer.[232]

It is my belief that prelaw students should be advised to enroll in courses offered by speech communication departments and programs. They should also be urged to participate in intercollegiate debating. Considerable advertising on the part of the speech communication department and debate program may be required. It may also require assignment changes which reflect the interests of the pre-law clientele. For instance, I have included a popular mock trial assignment in my Argumentation course. All of these efforts, I think, respond to what law schools desire, namely, potential law students who already have competencies in communicative fundamentals.

It could also be argued that all pre-law majors be required to take some speech communication instruction. The McBath survey revealed that 70 percent of the respondents favored prescription of speech communication instruction for pre-law students.[233]

Since law is a communicating profession, a final suggestion for pre-law education is that "a pre-law major in communication is certainly appropriate."[234] Undergraduate students do not traditionally major in communication studies, but hopefully this paper has given reasons why this pattern could and should change. Speech communication can provide a strong pre-legal education and it should be encouraged to do so. At the same time, we need to educate the law schools that we offer a program which is more than and different from elocutionary training. It has been the experience of this author that there is a significant lack of understanding by most people outside the field, and most particularly law school personnel, of what constitutes communication education.

Continuing Legal Education. Benthall-Neitzel surveyed lawyers to discover the means they had employed to supplement skills after law school. Nearly 85 percent read literature on skills; 68 percent attended formal continuing legal education programs, and 28 percent went to trial advocacy institutes.[235] Perhaps

because of its convenience, reading is the most frequently used method of on-going skills training. Rieke finds this unfortunate since most of the writing is of a "how to do it" nature from practitioners. "Reminiscences of what 'worked' in a certain trial...make for very interesting reading but questionable theory."[236] Therefore, I suggest once again that communications scholars team up with legal scholars to conduct research and build a theoretical base for communication in the legal process.

It was noted above that roughly one in four lawyers go to continuing legal education programs or trial advocacy institutes to learn something new about law or lawyering skills. Since the survey, I would estimate that the percentage has increased substantially since certain states now require mandatory continuing legal education for members of the profession.[237] As the requirement spreads like an amoeba, continuing legal education is becoming big business.

Some of the CLE programs are sponsored on a state-wide basis by state bar associations. "Nearly every state bar group has a continuing legal education program of varying quality and quantity."[238] "These workshops...attract eminent advocates of many years' practice as teaching participants in programs designed to aid the newcomer and the less proficient in improving trial skills."[239]

An organization which offers workshops at multiple locations throughout the United States is the Court Practice Institute. They are fully approved for CLE credit in every state where such continuing education is mandated. The objective of CPI's intensive program is "to provide meaningful training in the arts of trial advocacy which might otherwise take a considerable time to acquire."[240] Training is essentially divided into three parts--the study of text materials (Morrill's Trial Diplomacy), the observation of skilled lawyers performing various trial exercises, and student-participation in identical trial exercises. Topics include direct examination, opening statement, jury selection, closing arguments, preparing the witness, and cross-examination. Videotaping is common.

The Association of Trial Lawyers of America (ATLA) established the National College of Advocacy to conduct intensive CLE programs for lawyers. The methodology they employ is again "showing, telling, and participating."[241] In the mornings and early afternoons, the participants hear lectures and see demonstrations by leading trial lawyers. After these sessions, the students are divided into small groups according to prior litigation experience. In their groups, the students are asked to perform (e.g., present an opening statement). A workshop leader then critiques each performance. These workshops last approximately one week.

Finally, the National Institute for Trial Advocacy (NITA) was established in 1970 to teach trial advocacy to lawyers using a learning by doing approach. Most of the participants are young lawyers--those with less than five years experience. They, too, listen to lectures and watch demonstrations, but mostly they engage in performances followed by critiques. At the end of the workshop each participant has an opportunity to try two full trials as part of a team. Cases are taken from published NITA materials. Jurors are brought in from the community where the workshops occur. All performances are videotaped and the students have the opportunity to review the tapes with members of the teaching staff. Workshops last anywhere from nine to sixteen days.[242]

Lawyers who attend workshops like those noted above seem to be quite pleased. A typical comment from someone attending a Court Practice Institute program wrote: "My week at the CPI was one of the most rewarding and intensive studies that I have taken in my pursuit of the law. The opportunity to develop my trial skills in the presence of lawyers of the same basic skill level has taught me that my difficulties are not uniquely my own. I think you have made great strides toward destroying the myth that trial tactics cannot be taught."[243] Students attending a session of NITA were asked to return questionnaires.

Nearly 80 percent of them indicated that they could give a most enthusiastic recommendation to other lawyers to attend future NITA sessions. In no case was there a negative rating.[244] These are just a few samples of a considerable amount of evidence speaking favorably of skills training institutes.

The development of CLE programs in recent years has taken some of the pressure off law schools to provide training in lawyering skills. The bar can now pick up much of that responsibility. But where does that leave communication educators? How do they fit into the CLE picture? The answer is that they ought to team-teach with those in law who teach at the CLE seminars and workshops. Some of this interdisciplinary approach is already happening in small doses. For instance, at the National College of Advocacy, a clinical psychologist has helped them with witness responses and an expert on nonverbal communication has discussed with the participants the role of body language in the courtroom.[245] NITA has used some communications people in their program "and find they make tremendous contributions."[246] In a 1980 clinic on trial advocacy sponsored by the Institute for the Study of the Trial, lawyers and speech communication professionals will gather together to discuss and demonstrate strategic considerations in courtroom persuasion. We have just begun to link ourselves with these CLE groups and it is strongly recommended that we find ways to serve as consultants and teachers in CLE workshops in the future.

Prior to this final section in the paper, a rationale was presented for developing courses and programs that will serve to raise the communication level of the legal profession. The rationale was based in large part on the notion that lawyering is a communications profession. In the final section of this paper, several recommendations are made to initiate a closer working relationship between communication education and legal education in law school, in

pre-law courses and programs, and in continuing legal education. Here is a summary of those recommendations:

(1) Joint research needs to be conducted which more closely ties interpersonal communication theory, public communication theory, and argumentation theory to the practice of law.

(2) Communications faculty need to learn more about law and law faculty need to learn more about communications. Team-teaching ventures in law schools could profit both groups of professionals.

(3) Undergraduate instruction in speech communications needs to adapt more to the interests of pre-law students. Existing courses can be refined and new courses can be created. Lawyering skills can and should be taught during a pre-law student's undergraduate career.

(4) Pre-law students should be encouraged, perhaps required, to take courses in interpersonal communication, small group communication, public speaking, and argumentation. They should also be urged to participate on intercollegiate debating teams.

(5) Pre-law students should be recruited into speech communication departments as majors.

(6) Law schools need to learn what constitutes a speech communication major. Individual facutly, departments of speech communication, and professional speech associations should initiate an education campaign.

(7) Communications faculty should join with law faculty and practicing lawyers as consultants and/or teachers in CLE workshops focusing on skills training.

A well organized, well planned effort to implement these recommendations will certainly go a long way toward bridging the gap between communication education and legal education to the benefit of both disciplines.

FOOTNOTES

[1]Richard D. Rieke and Malcolm O. Sillars, Argumentation and the Decision-Making Process (New York: John Wiley and Sons, 1975), p. 229.

[2]Donald E. Williams, "Group Discussion and Argumentation in Legal Education," Quarterly Journal of Speech, 41 (December, 1955), 397.

[3]Malthon Anapol, "Rhetoric and Law: An Overview," Today's Speech, 18 (Fall, 1970), 15.

[4]Ibid., 14.

[5]Ibid., 16.

[6]E. Gordon Gee and Donald W. Jackson, "Bridging the Gap: Legal Education and Lawyer Competency," Brigham Young University Law Review, 1977 (1977), 722-723.

[7]Ibid., 725.

[8]Ibid., 731-732.

[9]"Thomas Jefferson founded the first of these professorships with the appointment of his formal legal preceptor George Wyeth to a chair of law at William and Mary in 1779. ...Those selected to fill these early chairs of law were largely prominent men from the bench or practicing bar and not primarily academicians, and thus must be distinguished from those who taught natural law, moral philosophy, and other law-related subjects at some colleges and universities." Ibid., 725-726.

[10]Albert J. Harno, Legal Education in the United States (San Francisco: Bancroft-Whitney, 1953), p. 39.

[11]Gee and Jackson, op. cit., 728.

[12]Ibid., 726.

[13]Harno, op. cit., pp. 28-30.

[14]Robert L. Clare, "Incompetency and the Responsibility of Courts and Law Schools," St. John's Law Review, 50 (1976), 464.

[15]Harno, op. cit., p. 39.

[16]E. Gordon Gee and Donald W. Jackson, Following the Leader? The Unexamined Concensus in Law School Curricula (New York: Council on Legal Education for Professional Responsibility, 1975), p. 4.

[17]Gee and Jackson, "Bridging the Gap...," op. cit., 733.

[18]Jerome Frank,"What Courts Do in Fact," Illinois Law Review, 26 (1932), 645.

[19]Gee and Jackson, Following the Leader?, op. cit., p. 41.

[20]There were a few exceptions to all schools following the Harvard model. One of them is Yale. "A difference of philosophy...existed between Harvard and Yale toward legal education. Yale attempted to teach a more practical course. ... In this philosophy, it was concerned with developing a rhetorical theory of legal practice. Representative of this theory is William C. Robinson's Forensic Oratory: A Manual for Advocates. Robinson, a professor of law at Yale University writing in 1893, expresses the underlying philosophy of his book in the Preface, 'Nothing is more desirable than that young advocates should be well trained in the principles and practice of this art (forensic oratory).' ... Robinson's Forensic Oratory...stands as an example of an effort to relate formal legal education and rhetorical theory in a way that had not been done for centuries. It is of interest that this sort of an effort was made during the formative years of American law school, and one can speculate what changes might have taken place had Yale become the leading and most influential of the law schools. However, it was...Harvard that...set the example for other law schools." Richard D. Rieke, "Rhetorical Theory in American Legal Practice," unpublished Ph.D. dissertation (Columbus: Ohio State University, 1964), 76-77, 81.

[21]Ervin N. Griswold, "Legal Education: 1878-1978," American Bar Association Journal, 64 (July, 1978), 1056.

[22]Robert Stevens, "Legal Education: Historical Perspectives," in Clinical Education for the Law Student (New York: The Council on Legal Education for Professional Responsibility, 1973), 51-52.

[23]Jerome Frank,"Why Not a Clinical Lawyer School?" University of Pennsylvania Law Review, 81 (1933), 907-908.

[24]Albert J. Harris, Legal Education in the United States (San Francisco: Bancroft-Whitney, 1953), p. 65.

[25]George S. Grossman, "Clinical Legal Education: History and Diagnosis," Journal of Legal Education, 26 (1974), 163.

[26]E. Allan Farnsworth, An Introduction to the Legal System of the United States (New York: Oceana Publications, 1963), p. 18.

[27]Edmund M. Morgan, "The Case Method," Journal of Legal Education, 4 (1952), 379-384.

[28]Griswold, op. cit., 1057.

[29]1978-1979 Prelaw Handbook (Princeton, New Jersey: Association of American Law Schools and the Law School Admission Council, 1978), p. 31.

[30]"Whatever uncertainties exist over the continued desirability of the case method in the upper curriculum, its importance as a primary teaching and learning device for the first year is widely acknowledged." Gene R. Shreve, "Classroom Litigation in the First Semester of Law School - An Approach to Teaching Legal Method at Harvard," Journal of Legal Education, 29 (1977), 103.

[31]Grossman, op. cit., 164.

[32]Gary Bellow and Earl Johnson, "Reflections on the University of Southern California Clinical Semester," Southern California Law Review, 44 (1971), 689-690.

[33]Grossman, op. cit., 166.

[34]Harno, op. cit., p. 137.

[35]Grossman, op. cit., 166-167.

[36]Robert A. Gorman, "Clinical Legal Education: A Prospectus," Southern California Law Review, 44 (1971), 552.

[37]Bellow and Johnson, op. cit., 690-691.

[38]Barry B. Boyer and Roger C. Cramton, "Americal Legal Research: An Agenda for Research and Reform," Cornell Law Review, 59 (1974), 277.

[39]Grossman, op. cit., 165.

[40]Jack Himmelstein, "Reassessing Law Schooling: An Inquiry into the Application of Humanistic Educational Psychology to the Teaching of Law," New York University Law Review, 53 (1978), 534.

[41]Robert Keeton, "Tell Me, Show Me, Involve Me," Learning and the Law, 16 (Winter, 1976), 64.

[42]Karl N. Llewellyn, "The Place of Skills in Legal Education," Columbia Law Review, 45 (1945), 350.

[43]Gee and Jackson, "Bridging the Gap...," op. cit., 758.

[44]Dominick R. Vetri, "Educating the Lawyer: Clinical Experience as an Integral Part of Legal Education," Oregon Law Review, 50 (1970), 59.

[45]Frank, "Why Not a Critical Lawyer School?" op. cit., 913

[46]"Indeed, in 1931, Adolf Berle, then a Columbia Law School professor, ... said to ne that 90% of teachers in our leading law schools had never so much met and advised a client, negotiated a settlement, drafted a complicated contract, consulted with witnesses, tried a case in a trial court or assisted in such a trial, or even argued a case in an upper court." Jerome Frank, Courts on Trial (Princeton, New Jersey: Princeton University Press, 1973), p. 227.

[47]Frank, "Why Not a Clinical Lawyer School?" op. cit., 916.

[48]Ibid., 912.

[49]Llewellyn, op. cit., 364.

[50]"During and immediately after the Second World War this development was briefly interrupted by a group of "Neo-Realists" who urged that curriculum reform be focused more on training lawyers to be "policy-makers" in our society." Grossman, op. cit., 167.

[51]Ibid., 168.

[52]Gary S. Goodpaster, "The Human Arts of Lawyering: Interview and Counseling," Journal of Legal Education, 27 (1975), 11.

[53]Boyer and Cramton, op. cit., 270.

[54]David R. Barnhizer, "Clinical Education at the Crossroads: The Need for Direction," Brigham Young University Law Review, 1977 (1977), 1029.

[55]Deedra Benthall-Nietzel, "An Empirical Investigation of the Relationships Between Lawyering Skills and Legal Education," Kentucky Law Journal, 63 (1975), 382.

[56]Gee and Jackson, Following the Leader?, op. cit., p. 7.

[57]Ibid.

[58]George A. Spater, cited in The Law Schools Look Ahead: 1959 Conference on Legal Education (Ann Arbor: University of Michigan Law School, 1959), p. 150.

[59]Barnhizer, op. cit., 1029.

[60]Gee and Jackson, Following the Leader?, op. cit., p. 6.

[61]William Kerr and Dean Rivkin, "Legal Education in a Clinical Setting - Developing Theories," an unpublished paper presented at the Clinical Teachers Conference, Snowmass, Colorado, June, 1979, 6.

[62]Benthall-Nietzel, op. cit.; Thomas A. DeCotiis and Walter W. Steele, Jr., "Lawyering Skills: A Critique," Trial Magazine (August, 1977), 30.

[63]Ibid.

[64]Ibid., 31.

[65]Irvin C. Rutter, "A Jurisprudence of Lawyers' Operations," Journal of Legal Education, 13 (1961), 316-317.

[66]1978-1979 Prelaw Handbook, op. cit., p. 10.

[67]Ibid.

[68]Goodpaster, op. cit., 22.

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[111]Benthall-Nietzel, op. cit., 391-392.

[112]Paul Savoy, "Toward a New Politics of Legal Education," Yale Law Journal, 79 (1970), 444, 446.

[113]Gee and Jackson, "Bridging the Gap...," op. cit., 936.

[114]Ibid., 941.

[115]McGowan, op. cit., 374.

[116]Pincus, op. cit., 491-492.

[117]Burger, op. cit., 168.

[118]"By 1966, there were fifteen clinics in law schools." Gee and Jackson, Following the Leader?..., op. cit., p. 42.

[119]Stevens, op. cit., 53.

[120]Patricia Hollander, "The Simulated Law Firm and Other Contemporary Law Situations," Journal of Legal Education, 29 (1978), 322.

[121]Spring, op. cit., 425-426.

[122]Berryhill, op. cit., 97-99.

[123]Gee and Jackson, "Bridging the Gap...", op. cit., 760.

[124]Council on Legal Education for Professional Responsibility, Inc., op. cit., p. vi.

[125]"The most effective method of legal education is neither the clinical nor the casebook, but instead a careful combination of these two complementary yet distinct vehicles. ... While the casebook method relies on collections of vicarious legal experiences for its ecucation content, the clinical method uses direct of 'firsthand' legal experience as the raw material to be shaped and molded by the law instructor." Barnhizer, op. cit., 1028.

[126]Pincus, op. cit., 482.

[127]Rutter, op. cit., 311.

[128]David R. Barnhizer, "The Clinical Method of Legal Instruction: Its Theory and Implementation," Journal of Legal Education, 30 (1979), 110.

[129]Guidelines for Clinical Legal Education, presented at the AALS-ABA Clinical Teachers Conference, Snowmass, Colorado, June, 1979.

[130]"In reality, the two can, and should, be complementary endeavors." Kerr and Rivkin, op. cit., 12. "Simulations and role-playing by the student are helpful as a preliminary or preparatory stage. ... They are particularly useful...as 'dress rehearsals' for the actual performances." Barnhizer, "The Clinical Method of Legal Instruction...," op. cit., 110. This author agrees with these statements and supports performance in the simulated setting preceding performance in the real setting.

[131]Joseph D. Harbaugh, "Simulation and Gaming: A Brief Note on a Teaching/Learning strategy for Clinical Legal Education," a paper presented to the Clinical Teachers Conference, Snowmass, Colorado, June, 1979, 5.

[132]The eight steps are isolating and learning the problem, examining the problem, deciding on the legal theories, establishing the controls, creating the stimulus mechanism, outlining the response mechanism, guaranteeing the consequence situation, and planning for feedback and reinforcement. Ibid., 13-16.

[133]Ibid., 17.

[134]Berryhill, op. cit., 94.

[135]Harbaugh, op. cit., 7-8.

[136]Vetri, op. cit., 64.

[137]Murray L. Galinson, "Interviewing, Negotiating and Counseling," Journal of Legal Education, 27 (1975), 352.

[138]"Most learning is enhanced by repeating the taught exercise. ... It produces positive results...in accordance with the principle that the learner requires a number of opportunities to integrate an understanding of the appropriate cues connected with the task being learned. ... It is unusual for a law student...to perform a good interview on the first try. It is more likely that the student will do well in some parts of the interview...and will do less well with other aspects...because he or she cannot learn all these things at once. Thus, the law student should practice the interviewing to develop an awareness of all cues and appropriate responses," Harbaugh, op. cit., 7.

[139]Goodpaster, op. cit., 35.

[140]Ibid., 19.

[141]Vetri, op. cit., 64.

[142]Harbaugh, op. cit., 19.

[143]Students engage in role-playing face-to-face interviews that are videotaped. The interviews are evaluated . Then student access to nonverbal information is reduced by conducting the interviews over the telephone. Both ends of the interview are again videotaped and shown in split-screen fashion. The students see just one side of the screen first, then both sides. "This simulation technique is extraordinarily effective in teaching students the importance of eye contact, body movements, facial expressions and other nonverbal communicators." Ibid., 19-20.

[144]Barnhizer, "The Clinical Method of Legal Instruction," op. cit., 78.

[145]Goodpaster, op. cit., 33.

[146]Harold H. Greene, "Judging the Students: Judicial Attitudes on Student Practice," in Clinical Education for the Law Student (New York: The Council on Legal Education for Professional Responsibility, 1973), 273.

[147]Cornelius J. Peck and Robert L. Fletcher, "A Course on the Subject of Negotiation," Journal of Legal Education, 21 (1968), 197-198.

[148]Robert E. Mathews, "Negotiation: A Pedagogical Challenge," Journal of Legal Education, 6 (1953), 100.

[149]Denton R. Morre and Jerry Tomlinson, "The Use of Simulated Negotiation to Teach Substantive Law," Journal of Legal Education, 21 (1969), 585.

[150]Joan B. Kessler and Caryn Cleeland, "A National Survey of Legal Communication Courses at S.C.A. Affiliated Universities and at A.B.A. Accredited Law Schools," a paper presented at the Western State Communication Association convention, Phoenix, Arizona, 1977, 4.

[151]Berryhill, op. cit., 107.

[152]Barnhizer, "The Clinical Method of Legal Instruction,...", op. cit., 78.

[153]McElhaney, op. cit., 216.

[154]Gorman, op. cit., 539.

[155]Bellow and Johnson, op. cit., 674.

[156]Alan E. Morrill and Leroy J. Tornquist, "An Experiment in Trial Advocacy," Trial Magazine (March, 1977), 55.

[157]Cross-examination problems are explored by using actor-witnesses who are other students enrolled in the Trial Techniques course. They dramatize different personalities, attitudes, and memories of a factual configuration given to them in advance.

[158]Videotapes can be placed on reserve in the law library so students can observe and study them at their conveninence.

[159]Donald S. Cohen, "Ensuring an Effective Instructor-Taught Writing and Advocacy Program: How to Teach the Teachers," Journal of Legal Education, 29 (1978), 608.

[160]Morrill and Tornquist, op. cit., 57.

[161]Bellow and Johnson, op. cit., 674-675.

[162]William Marple, "The Basic Legal Techniques Course at Catholic University School of Law: First-Year Lawyering Skills," Journal of Legal Education, 26 (1974), 560.

[163]Michael H. Graham, "The Trial Advocacy Program Experience at Illinois: Excellence in the Teaching of Many at an Affordable Price," Journal of Legal Education, 29 (1978), 586.

[164]A.P. Ordover, "An Experiment in Classroom Litigation," Journal of Legal Education, 26 (1973), 104.

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[166]Ibid., 316.

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